

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RIDGEWOOD HEALTH CARE )  
CENTER, INC. AND RIDGEWOOD )  
HEALTH SERVICES, INC., A )  
SINGLE EMPLOYER )

and )

Case 10-CA-113669

UNITED STEEL, PAPER AND )  
FORESTRY, RUBBER, )  
MANUFACTURING, ENERGY, )  
ALLIED INDUSTRIAL AND )  
SERVICE WORKERS )  
INTERNATIONAL UNION (USW), )  
AFL-CIO )

**RESPONDENTS' OPPOSITION TO GENERAL COUNSEL'S MOTION TO CORRECT  
REMEDY**

Respondents Ridgewood Health Care Center, Inc. ("RHCC") and Ridgewood Health Services, Inc. ("RHS") (collectively "Respondents"), in Opposition to the General Counsel's Motion to Correct Remedy in the Administrative Law Judge's Decision, state as follows:

**INTRODUCTION**

The National Labor Relations Act ("NLRA") regulations state that "no matter not included in exceptions [to the ALJ's Decision] . . . may thereafter be urged before the Board, or in any further proceeding."<sup>1</sup> Nonetheless, the General Counsel's "Motion to Correct" seeks to amend the ALJ's findings and rulings **fifteen months after the deadline for filing exceptions** of May 1, 2015. Moreover, although the General Counsel's filing is incorrectly characterized as a "Motion to Correct" and falsely labels the ALJ's omission as "inadvertent," the General Counsel did not pursue the remedy sought in the Motion in the Complaint in this case, at the hearing, in

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<sup>1</sup> 29 C.F.R. § 102.46(g).

the post-hearing brief, or in his exceptions or brief in support thereof. The alleged remedy has not been litigated in this case. For all these reasons, the General Counsel's Motion must be denied.

A. **The General Counsel's "Motion to Correct" Is an Extremely Untimely Exception that Must Be Denied.**

Exceptions in this case were due fifteen months ago by May 1, 2016. After Administrative Law Judge Michael A. Rosas issued his decision on March 27, 2015 and the matter was transferred to the National Labor Relation Board ("Board"), on April 21, 2015, the Board granted an extension of time to all parties to file Exceptions and Supporting Briefs by May 1, 2015. Respondents, the General Counsel, and the Charging Party all filed timely exceptions and supporting briefs by May 1, 2015.

No exceptions were filed to the ALJ's decision not to award a "make whole remedy" for Respondent RHS's unilateral changes to the employees' terms and conditions of employment. Despite filing timely exceptions, neither the General Counsel's nor Charging Party's exceptions challenged the ALJ's decision not to award a "make whole remedy" for Respondent RHS's changes to the employees' terms and conditions of employment. In fact, even though the General Counsel filed an exception to (1) the ALJ's failure to include in the Order "a requirement that Respondents, upon request, rescind any and all changes Respondents made to employees' terms and conditions of employment and restore the terms and conditions in effect prior to those changes" despite including the requirement in the Remedy<sup>2</sup> and (2) failure to include a "make whole" remedy for the alleged § 8(a)(5) discriminatees,<sup>3</sup> the General Counsel's

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<sup>2</sup> General Counsel's Exceptions to the Decision of the Administrative Law Judge, May 1, 2016, ¶ 3.

<sup>3</sup> General Counsel's Exceptions to the Decision of the Administrative Law Judge, May 1, 2016, ¶ 2.

Exceptions did not challenge the decision not to award a “make whole remedy” for the changes to the terms and conditions of employment.

The General Counsel’s “Motion to Correct Remedy” is due to be denied because it is, in actuality, an untimely exception. Exceptions are the only mechanism to challenge “questions of procedure, fact, law, or policy” in an “administrative law judge’s decision.” 29 C.F.R. § 102.46(b)(1). The Board’s rules provide that **“[n]o matter not included in exceptions ... may thereafter be urged before the Board, or in any further proceeding.”** 29 C.F.R. § 102.46(g) (emphasis added). “Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.” 29 C.F.R. § 102.46(a)(2). In fact, if not exceptions are filed, the findings of the ALJ “automatically become the decision and order of the Board and become its findings, conclusions, and order.” 29 C.F.R. § 102.48(a).

Here, the Board-ordered due date for exceptions was May 1, 2015, *fifteen months* before the filing of the “Motion to Correct.” The General Counsel’s “motion” challenges ALJ Rosas’ ruling and legal determination about the remedy available and, therefore, is properly characterized as an exception. Clearly, the General Counsel considered such a challenge an “exception” as it filed an exception to the ALJ’s decision not to award a “make whole” remedy to the alleged § 8(a)(5) discriminatees.

The General Counsel’s filing is over a year and three months too late. The General Counsel has not even attempted to justify this late filing, even allege excusable neglect, or explain why his motion is not an exception that goes to the substantive issues in this case. If parties are allowed to file exceptions fifteen months after the due date with no explanation for



their lateness, the regulation-established deadline would mean nothing.<sup>4</sup> As such, the General Counsel's motion is due to be denied as a matter of law.<sup>5</sup>

**B. The ALJ's Omission of the Remedy Belatedly Requested Here Was Not Inadvertent, and the Requested Remedy Was Not Sought or Litigated at the ALJ Stage, or in Timely Filed Exceptions.**

Inexplicably, the General Counsel alleges the ALJ's failure to award a "make whole remedy" for RHS's changes to the terms and conditions as an "error," despite the fact that the General Counsel has never raised the issue despite years of litigation.

The remedy sought here was not requested in the General Counsel's Complaint, at the hearing, in his Post Hearing Brief, or in his Exceptions to the ALJ's Decision. The § 8(a)(5) make-whole remedy sought here was not requested in General Counsel's December 3, 2014 Amended Complaint. (Hearing GCX-1(r)) Indeed, General Counsel merely sought "an Order rescinding the unilateral changes and restoring the terms and conditions that were in effect prior to those changes." (GCX-1(r), pg. 11, ¶ 31).

Nor was the § 8(a)(5) make-whole remedy raised in the hearing or made a part of General Counsel's March 5, 2015 post-hearing brief. (*See* General Counsel's Post Hearing Brief). Indeed, General Counsel's post-hearing brief, under the "Remedy" section, merely sought "upon request of the union, rescind any and all changes Respondents have made to employees' terms and conditions of employment and restore those that were in effect prior to those changes." (GC Post

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<sup>4</sup> *See, e.g., Bartlett Nuclear, Inc.*, 314 NLRB 1, n. 1 (1994) ("If the Board were to excuse a failure to ascertain the requirements of applicable rules, then the rules would become a nullity.")

<sup>5</sup> *Ridgewood Health Care Center, Inc.*, Case No. 113669, 2015 WL 6429384, \*1 (N.L.R.B. Oct. 22, 2015); *see Kiekhoefer Corp. v. NLRB*, 273 F.2d 314, 316 (7th Cir. 1960) (affirming Board finding that exceptions received one day late were untimely).

Hearing Brief, pg. 34, ¶ 2). As set forth above, the § 8(a)(5) make-whole remedy was also not raised in General Counsel's May 1, 2015 Exceptions.

Further, contrary to the caption of the General Counsel's motion, ALJ Rosas did not make a mistake and the General Counsel cannot, and has not, identified any facts or evidence that would suggest the ALJ has made a mistake. Indeed, the ALJ was not required to provide the General Counsel a remedy he never asked for in his complaint, never raised at hearing, and never briefed in his post-hearing brief. There is simply no basis for concluding ALJ Rosas mistakenly omitted doing something he was never asked to do.<sup>6</sup>

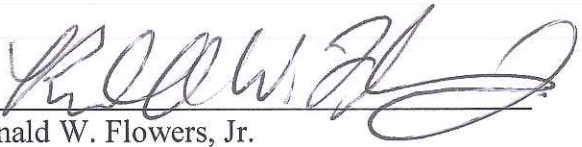
Just as importantly, the Board should refuse to issue a remedy that was not sought or litigated. Respondents never consented to litigating the new remedy the General Counsel has just raised and, indeed, it was not litigated. Entertaining this new theory now -- when it was not raised in the complaint, at hearing, in post-hearing briefing, or in timely filed exceptions -- a year and three months after the case has been transferred to the Board, would place an undue burden on Respondents and deprive them of an opportunity to present an adequate defense.

### CONCLUSION

For all the foregoing reasons, the General Counsel's Motion to Correct is due to be denied.

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<sup>6</sup> The cases cited by the General Counsel, none of which involve successorship issues, do not support his Motion because none of the cases address untimely exceptions filed seeking relief not sought for by the NLRB or litigated at the hearing or briefing. See Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (U.S. 1964); Carey Salt Co., 358 N.L.R.B. 1142 (N.L.R.B. 2012); Alta Vista Regional Hosp., 355 N.L.R.B. 265 (N.L.R.B. 2010); United Steel Serv., 351 N.L.R.B. 1361 (N.L.R.B. 2007).

/s/   
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of August, 2016, I filed the foregoing via the Board's electronic filing system, and served a copy of the foregoing by electronic mail upon the following:

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